SUPREME COURT, U. S.

MAR 4 1969

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1108

JACK O. CHERTKOF, *Petitioner,*

v.

HARRY C. WEISKITTEL CO., INC., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Petitioner, Jack O. Chertkof, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland, entered in the above-entitled cause on December 4, 1968.

CITATIONS TO OPINION BELOW

The opinion of the Court of Appeals of Maryland (Appendix B, *infra*, pp. B. 1-11; R.[1] 75-86) is reported in 251 Md. 544, 248 A.2d 373. No formal opinion was filed in the Superior Court of Baltimore City, the trial court.

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[1] "R" refers to the record certified to this Court by the Court of Appeals of Maryland.

That court's "Findings of Fact, Conclusions of Law and Order" of August 1, 1967 (Appendix A, *infra*, pp. A. 18-31) and its statements in its proceedings of July 20, 1967 (Appendix A, *infra*, pp. A. 1-18), some of which bear upon the bases for its disposition of this cause, are not reported.

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on December 4, 1968 (R. 1, 4, 87; Appendix B, *infra*, p. B. 1). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3), since the judgment of the Court of Appeals of Maryland infringed rights, privileges and immunities specially set up and claimed under the Constitution of the United States. The federal question was raised as indicated at p. 5-7, *infra*. The excerpts from the record showing the raising of the federal question are set out in Appendix A, *infra*, pp. A. 5-7, 10 and 11, in what are, in effect, the proper person statements of petitioner therein set out.

QUESTION PRESENTED

During trial of a civil, jury action in a state court, the trial judge and the litigants discussed settlement in chambers. No one else was present. The discussions were held with the consent of the lawyers and ostensibly resulted in settlement of the case. Differences arose between the parties as to the terms of that settlement and respondent moved to enforce its version of the disputed terms. The trial judge, who had participated in formulation of the settlement terms, heard the motion and enforced respondent's version of the disputed terms. The question presented is:

> Did the trial judge, in the circumstances, deny petitioner due process of law and violate the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States?

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT

This case originated when petitioner, a consulting engineer employed by respondent to modernize its foundry producing cast iron soil pipe, sued respondent for $135,000 which he claimed was due him under his written employment contract (E.[2] 1, 5-10). Respondent counterclaimed, asking $500,000 damages and alleging very vividly that petitioner not only had failed to perform the services required of him in a reasonably competent manner, but had performed so negligently that he failed to meet even minimal standards applicable to a normally competent consulting engineer (E. 10-19). The case came on for trial before a jury in the Superior Court of Baltimore City on June 5, 1967 (E. 19). Petitioner was the first and as it developed the only witness. During the third day of his direct testimony, on June 7, 1967, an issue arose as to admissibility of his anticipated evidence pertaining to negotiations between the parties. Colloquies occurred between the court and counsel. Ultimately, the jury was excused for the day and the trial judge, at the suggestion and with the consent of all the lawyers, met in chambers with the litigants alone for a substantial portion of the day to see if the case could be settled. (E. 19-22, 28, 41)

Neither the lawyers nor the court reporter were present during the ensuing discussions between the court and the parties and no record was made of them (E. 1-62, 28-30, 41), but the court's conversations with the litigants seemingly

[2] "E." refers to the Record Extract filed in the Court of Appeals of Maryland, part of the record (R. 2-66) certified by that court to this Court.

resulted in settlement of the case (E. 28-29). On the next day, June 8, 1967, the lawyers met in chambers with the judge, but without the litigants, and respondent's lawyer, in the presence of petitioner's lawyer, dictated to the court reporter the supposed terms of the settlement reached by the court and the parties on the preceding day (E. 22-24; Appendix A, *infra*, pp. A. 22-25). When he became aware of the content of that dictation, petitioner promptly refused to consummate settlement on the terms dictated, declaring that an essential element of the agreement reached by the parties and the court on June 7, 1967, *viz.* his entitlement to specific exoneration from charges of professional incompetence made against him in respondent's counterclaim, had been omitted from the supposed settlement terms dictated, in the absence of the parties, on June 8, 1967 (E. 28-30; Appendix A, *infra*, pp. A. 5-7).

Respondent moved to enforce settlement on the terms which had been dictated by its counsel (E. 41-47). Although he had participated in the discussions which gave rise to the disputed settlement terms, the trial judge nevertheless undertook to hear the motion. He heard it on July 20, 1967, in chambers, on unsworn statements made to him by counsel and by petitioner. (E. 24-41; Appendix A, *infra*, pp. A. 1-18) Permitted, over respondent's objection, to make a proper person statement, petitioner asserted as a fact that the trial judge on June 7, 1967 had assured him he would have specific exoneration as part of the settlement and such exoneration would be stipulated in a release he would receive from respondent. He said that during the discussions on June 7, 1967 he had tried to impress upon the trial judge that such exoneration, and not the sum of $85,000 which he was also to receive in the settlement, was his "first prime consideration" (E. 28, 28-31; Appendix A, *infra*, p. A. 5, pp. A. 5-7). (Petitioner was permitted to speak in proper person because his trial counsel was concerned that he might be occupying an equivocal position, or "wearing two hats" (E. 26; Appendix A, *infra*, p. A. 3), since he had par-

ticipated without objection in the proceedings on June 8, 1967, when respondent's counsel dictated the disputed settlement terms now challenged by petitioner. He hence obtained for petitioner an opportunity to speak for himself on the issue. (E. 25-28; Appendix A, *infra*, pp. A. 2-5).)

Thereupon, the trial judge decided the motion, adversely to petitioner. He found as a fact that the dictation of June 8, 1967 accurately set out the agreement made by the parties in their meetings with him on June 7, 1967 (E. 34-36, 38; Appendix A, *infra*, pp. A. 11-12, 15) and made an order (E. 48-61; Appendix A, *infra*, pp. A. 18-31) enforcing settlement on the terms dictated by respondent's counsel. On petitioner's appeal from the enforcement order, the Court of Appeals of Maryland affirmed the trial court's action, holding, in part, that petitioner

> ". . . knowingly and voluntarily with full knowledge of all pertinent facts submitted to Judge Prendergast the determination of his claim that the release was not in accord with the agreement reached. If Chertkof had a wish or a right to have the issue he raised tried by another finder of fact, he waived that wish or that right. Even a fundamental constitutional right can be knowingly and voluntarily waived." (R. 83; Appendix B, *infra*, p. B. 8)

How the federal question is presented

The federal question presented in the instant cause arose at the hearing on July 20, 1967 of respondent's motion to enforce its version of the disputed settlement terms. All other issues presented to the Court of Appeals of Maryland in the case arose at the same time and in the same manner. There petitioner made what was tantamount to a proper person appearance. His trial counsel had announced that petitioner would speak for himself on the issue in dispute and the trial court permitted him so to speak. He clearly made known to the trial judge, though perhaps in an unartful or inept manner and not with that technical nicety

which might have been expected had counsel spoken for him, exactly what he desired the court to do and exactly what his objections were to the action ultimately taken by the court. (R. 29, 30, 32-34; E. 25, 26, 28-30; Appendix A, *infra*, pp. A. 2, 3, 5-7) His statement thus sufficed under Maryland procedure to raise all points and issues relevant to the validity of the trial court's action, including constitutional ones, and to preserve them for review. Maryland Rules of Procedure, Rule 522, b. Its remark regarding waiver, *supra*, p. 5, demonstrates an awareness on the part of the Court of Appeals of Maryland that petitioner's statement had indeed preserved and presented to that court constitutional issues, which were briefed and argued by petitioner there. That same statement should suffice to preserve for review by this Court the federal question here involved, despite that petitioner did not spell out his constitutional objections to the trial judge. *Cf. Rice v. Rigsby*, 259 N.C. 506, 131 S.E.2d 469 (1963). Those objections were implicit in what he did say.

It is apparent from the record that at the hearing on July 20, 1967 petitioner spoke for himself by necessity, not choice. His able and experienced trial counsel, being in at least uncertain position (E. 26), perhaps one even adverse to petitioner on the main issue, *i.e.* as to the actual terms of the disputed settlement (E. 34), pursued the only appropriate course. He obtained for petitioner an opportunity to speak for himself. The questions then raised on petitioner's side were raised by him, not by his counsel. Being thus obliged to fend for himself in a highly technical affair, petitioner should not thereafter be penalized because as a layman untutored in the law he lacked, or failed to apply, the special skills or particular knowledge necessary to assure employment of appropriate formalities in making the points which he sought to present. He should instead be afforded the benefit of all issues, including the instant federal question, which reasonably arise from his forthright statement fully apprising the trial judge of his position. *Cf. Rice v. Rigsby, supra*, in which lack of specificity *by*

counsel in raising constitutional objections was excused by the North Carolina appellate court.

The Court of Appeals of Maryland endeavored to deal with petitioner's due process point by inferring that he waived it. *Supra*, p. 5; Appendix B, *infra*, pp. B.8-9. But it held also that the trial judge was not disqualified from hearing the enforcement motion by his participation in the discussions at which the disputed settlement terms were developed. And it made that holding despite that disposition of the motion obliged the judge to decide what the the terms of settlement really were. That factual determination, as to an event in which he had been an actor, controlled his decision on the motion. But the Court of Appeals of Maryland apparently did not think that circumstance was significant. It said:

> ". . . We see no reason why, as a matter of law, he was disqualified to act simply because he had a knowledge of what had previously happened in the case, a knowledge obtained in the course of his official judicial duties." (Appendix B, *infra*, p. B. 8)

That holding, petitioner submits, incorporates a specific rejection of his federal constitutional contentions, made in the Court of Appeals of Maryland. Beyond that, petitioner respectfully suggests, when a trier of facts has himself helped to create the very facts which he is called upon to judge, the federal constitutional question here sought to be presented to this Court arises from and is presented by that circumstance alone.

REASONS FOR GRANTING THE WRIT

A state court has decided a federal question of substance in a way probably not in accord with applicable decisions of this Court.

In the Court of Appeals of Maryland and the trial court petitioner contended that he was entitled to a judge who had nothing to do with the issue presented to him for decision. In holding that the trial judge was not disqualified, despite his participation in the events which created the factual dispute he was required to resolve, the Court of Appeals of Maryland decided a federal question of substance in a way probably not in accord with applicable decisions of this Court.

This Court has declared that personal knowledge of facts in issue will disqualify a judge. *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623 (1955). There this Court held that the same judge who sat as a Michigan "one-man judge-grand jury" and heard witnesses could not consistently with the Due Process Clause of the Fourteenth Amendment preside at a hearing at which those witnesses were convicted of contempt for their conduct before the "one-man grand jury". There this Court announced that

> "A fair trial in a fair tribunal is a basic requirement of due process."

and that the stringency of the requirement of fairness

> ". . . may sometimes bar trial by judges who have no actual bias and would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11, 13."

349 U.S. 133, 136, 75 S.Ct. 623, 625. There this Court noted that

> "As a practical matter it is difficult if not impossible for a judge to free himself from the influence

> of what took place in his 'grand-jury' secret session. His recollection of that is likely to weigh far more heavily with him than any testimony given in the open hearings."

349 U.S. 133, 138, 75 S.Ct. 623, 625. This Court also pointed out that the record there illustrated that

> "Thus the judge whom due process requires to be impartial in weighing the evidence presented before him, called on his own personal knowledge and impression of what had occurred in the grand jury room and his judgment was based in part on this impression, the accuracy of which could not be tested by adequate cross-examination."

(*Id.*) See also *In re Oliver*, 333 U.S. 257, 68 S.Ct. 449 (1948), holding that such a Michigan "judge-grand jury" could not in the face of the Due Process Clause summarily convict at a secret hearing a witness who testified before him at that hearing.

The principles enunciated in *Murchison, supra*, are applicable to the instant cause. Having himself participated in the event, the conferences in chambers on June 7, 1967 with the litigants alone, without their lawyers, which created the issues presented by the motion to enforce the disputed settlement agreement, the trial judge could not then validly decide those issues, or decide what in fact the actual terms of the disputed settlement agreement really were, or judicially determine any question raised by the motion and by petitioner's proper person objection thereto. He could no more do so than he could properly hear an automobile collision case, had he been one of the drivers, or even a witness to the accident; a dispute arising out of an arbitration, had he been the arbitrator; a criminal cause, had he been indicted, investigator or prosecutor; or a contempt case, had he been a "judge-grand jury".

Issues of fact were involved. The chief of these was the question whether or not the parties *in his presence* had actually agreed that petitioner was to have the specific

exoneration which he said he sought. But the trial judge had himself participated in the formulation of those very facts, the existence, absence or effect of which he was called upon to determine. He had inevitably acquired his own knowledge of those facts. He was one of the actors who created them. He might have been a most material witness to what occurred in his chambers on June 7, 1967. No judge, however learned, however exacting, however free from actual bias, however strenuously he might strive "to weigh the scales of justice equally between contending parties", *supra*, could sit in judgment in such circumstances with an unaffected mind. The trial judge on July 20, 1967 must have had his own idea of what had occurred between the parties in his chambers on June 7, 1967 because he was there when it happened. But that is exactly the vice of his position, since the litigants were entitled to a court free from such preconception. The trial judge hence should not have acted on the motion put before him. He should have sent the matter to some other trier of facts. He was the only judge who could not constitutionally deal with it.

Other courts have adhered to the principles expressed in *Murchison*. See, *e.g.*, *Crawford v. Bounds*, 4 Cir., 395 F.2d 297, 304 (1968), a North Carolina murder case in which the jury decided punishment as well as guilt. Veniremen with scruples against capital punishment were kept off the panel, while one person who regarded the death sentence as his duty was chosen. The appellate court commented that any "basic form of predisposition on the part of the trier of the fact results in a denial of due process." See also *Halliday v. United States*, 1 Cir., 380 F.2d 270 (1967), a kidnapping case in which a district judge accepted guilty pleas without making the customary inquiry. When the defendant thereafter sought to vacate the ensuing judgment, it was held that the same judge who took the pleas could not properly try the issue whether they had in fact been voluntarily given. *Cf. Berkeley County Public Service Dist. v. Vitro Corp. of America*, W. Va., 162 S.E.2d 189, 202

(1968), a declaratory judgment action brought to construe a contract for the sale of water. Vitro's predecessor had purchased land near Martinsburg airport and built a plant. It also entered into a contract to purchase from the local water district industrial water "as it shall require". The plant subsequently became a division of Vitro and ultimately was closed. The issue in the case was whether under the contract Vitro remained liable for payment of minimum charges for water after it closed its plant. An issue also arose as to the ability of the judge to hear the case, he having formerly been the city attorney. The court held that "The fact that the trial judge was attorney for the City of Martinsburg when negotiations were made for the sale of the property to the defendant, or its predecessor, did not disqualify him from sitting in the case at bar because such negotiations had nothing to do with the issue presented before him in this case." Compare the instant cause. The negotiations in which the judge participated had everything to do with the issues presented. That no witnesses were sworn or testimony taken at the hearing in which he decided those issues can only add to the effect of his participation.

The federal constitutional question is of importance in the administration of justice.

The question presented by this case as to the ability of anyone to try facts when he has participated in their occurrence is one of critical importance in the administration of justice. It is difficult to postulate a greater threat to a system of ordered justice than the proposition that personal knowledge obtained by participating in their formulation is an acceptable substitute for evidence of relevant facts. Under our law the trier of facts, whether juror or judge, is ordinarily disqualified by personal knowledge of the facts he is called upon to try. Due process requires that much. This Court should guard against any relaxation of that requirement.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BENJAMIN LIPSITZ,
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Attorneys for Petitioner.

March 4, 1969

APPENDIX A

[Excerpts from Proceedings]

IN THE SUPERIOR COURT
OF BALTIMORE CITY

JACK O. CHERTKOF
Plaintiff

vs.

HARRY C. WEISKITTEL CO., INC.,
Defendant

HARRY C. WEISKITTEL CO., INC.
Counter-Plaintiff

vs.

JACK O. CHERTKOF
Counter-Defendant

Docket
1964
Folio 720
File No. 86761

* * *

[266] July 20, 1967

(The Court and Counsel convened in Chambers where the following discussion took place:)

THE COURT: Well, gentlemen, there has been filed in this case a motion by counsel for the defendant and counter-plaintiff, to enforce the settlement agreement made in the course of the trial of this case in June. The motion recites that Jack O. Chertkof, plaintiff and counter-defendant, has imposed certain

additional conditions to the settlement which had been agreed upon, but which has not as yet been consummated. Attached to the motion is a xerox copy of the Release prepared by the office of Sherbow, Shea, and Doyle, which I understand has not as yet been executed by Mr. Chertkof, and necessarily by anyone else. This is a Release to be signed I see only by Mr. Chertkof in his individual capacity and as President of his firm, which is the offices of J. O. Chertkof.

MR. SHERBOW: Pardon me, Your Honor, the Releases to be executed by the party we represent are executed and we have them, together with the executed note.

THE COURT: Yes, it is not contemplated that they be filed, however, pursuant to the original agreement —

[267] MR. SHERBOW: Until we get their releases, we have complied with everything we could do.

THE COURT: You have your petition?

MR. SHERBOW: Yes.

THE COURT: Mr. Sherbow, is there anything you or your associates would care to add to what is alleged in the motion at this time?

MR. SHERBOW: I have nothing to add to it at this time, except one particular technical matter. No answer has been filed to the motion. I hate to admit it at this late date with the fact, although Mr. Chertkof and Mr. Whiteford, his attorney, were present, that they would say we didn't file an answer because our time to file an answer had not expired. Under the Rule, I take it, it is fifteen days to any paper that a response must be filed and it may be this response isn't due until tomorrow, or Saturday. I don't know.

MR. WHITEFORD: There will be no such technical defense asserted.

THE COURT: Do you propose to file an answer?

MR. WHITEFORD: No, I have not proposed, may it [268] please Your Honor. Mr. Chertkof is here today and I would like merely for him to explain his reasons in person why he feels he should not sign the Release and the papers as prepared.

MR. SHERBOW: We would like to note an objection to this on the record, on the grounds that the agreement of settlement was completed in Court with the approval of the Court. That all the parties were represented by their counsel, that counsel participated,they participated. The Court, acting on the agreement of the Release which had been entered into, withdrew a Juror and dismissed the Jury and stated that the case had been settled and any testimony now of any character relating to subsequent matters would be improper and have no bearing in the case.

THE COURT: Mr. Whiteford, what have you to say to the objection?

MR. WHITEFORD: If Your Honor please, I am here in the role of probably wearing two hats, one as an advocate who must assert his client's rights and argue for his client as his client desires them to be asserted, and I think under those circumstances, I argue very strenuously [269] that Mr. Chertkof has a perfect right to explain why he does not want to sign a Release. Why he doesn't understand that the proposed settlement was as he understood it in His Honor's chambers. I am wearing another hat as an attorney who participated. I am somewhat embarrassed to say this, but as counsel I cannot — I am searching for the right word. I cannot object to Judge Sherbow's objection, put it that way.

THE COURT: Perhaps the best way to bring the matter to a head then is for the Court to act sua sponte, and put this all on the record, of course, and let me ask Mr. Chertkof certain questions as to what he has done, or what he wants to do.

MR. SHERBOW: As long as our client's rights are — and the Court proposes to ask the questions then, of course, it is in the record. The Court may then strike out, or the Court may say it gives some weight to it, or it gives weight, but this is the Court's view, but I do want to reserve my objection.

THE COURT: You have your objection and I will consider striking out all of this, as I think it should be, [270] but I think the only way to get to the bottom of this thing is to explore it.

MR. SHERBOW: If Your Honor please, I wish to be certain that the Court is aware and has before him the full transcript of what was taken in this case.

THE COURT: June 8th.

MR. SHERBOW: Does Your Honor have the transcript, and is it a part of these proceedings? We did not attach it to our motion for this reason, Your Honor. At the time these discussions were taking place all parties agreed that the reasons which might involve credit agencies, Dun & Bradstreet they would not have this filed with the proceedings. It is in the transcript, that being the case I offer, so the Court will have before him, not recollection but the actual transcript.

THE COURT: I have it.

MR. SHERBOW: I offer the transcript to be made a part of this record with the request that in compliance with the agreement of the parties that they have been sealed as it is not made available for the general public except upon order of the Court. Therefore, we carry out [271] the terms of the transcript, but at the same time you have the right to see it and not rely on memory.

THE COURT: The Reporter gave me a carbon copy, five pages in length, which I have been reviewing while you were speaking and at the same time listening to you. Is there any objection to that suggestion, that the original be filed and sealed so that it will open only by order of the Court? Or, is it necessary to do that?

MR. WHITEFORD: I don't even know if it is necessary.

THE COURT: Let's defer ruling on that.

MR. SHERBOW: All right.

THE COURT: Now, Mr. Whiteford, have you obtained a copy of the Release to be executed by the Weiskittel interests, meaning of course Mr. Klaff, Mr. Plant and the others?

MR. WHITEFORD: Have I received a copy of the Release they have already executed? I don't think I have.

MR. SHERBOW: You received copies of the agreement.

MR. WHITEFORD: Yes.

MR. SHERBOW: We have an extra copy, but obviously [272] we are waiting to give them ours when they give us theirs. We have them and you may see them.

THE COURT: This is all preliminary to the question I wanted to ask you and that is, are you satisfied and does your client have satisfaction with this performance on the part of your adversary, which is Weiskittel?

MR. WHITEFORD: Mr. Chertkof is unsatisfied because it is his position — I will express primarily for him that under the terms of the agreement he was entitled to exculpation from the charges made against him. The counter suit, and that the exculpatory words are not contained and that the dismissal, or the verdict in his favor in the counter-claim, does not fully fulfill that purpose. Now, he can explain in more detail.

THE COURT: All right, I will hear from you Mr. Chertkof.

MR. CHERTKOF: I received a copy of the release, which release it is, first, second, or third I don't know, but that release has a lot of words and at the end of the release there was another page in which there was an order to the Clerk of the Court. If Your Honor will recall that [273] after the Jury was recessed, and we came into chambers, counsel came into chambers, and then counsel left the Court's chambers and Messrs. Klaff, Plant and myself came in here. We spoke for over two hours and during that period of time, I think I impressed on the Court that the first prime consideration would have to be exoneration from the counter-claim, and the Court tried to assure me that this would be in the form of a release and a judgment in favor of the defendant in the counter-claim. We didn't reach the monetary aspect of the case, or settlement until Your Honor gave us permission to talk to our counsels and discuss that

aspect. After lunch, when we came back, counsel came into chambers and in about ten or fifteen minutes, it was by two o'clock, counsel came out and the Messrs. Klaff and Plant and myself came back in. And during this period of time, again the Court assured me that exoneration would, and I tried to impress upon His Honor that it wasn't the prime consideration, money, as far as I was concerned, and I think I impressed it upon the Court and then the Court asked us to leave and counsel came back. Your Honor then talked to counsel and counsel came out into [274] the Court and Mr. Whiteford handed me a piece of paper and you will recall that when Mr. Whiteford — Mr. O'Connell and myself came back into Court, the first thing I said to His Honor was that Mr. Whiteford was very embarrassed and I quoted exactly what he said in his presence. Mr. Whiteford had said — and when I show you this piece of paper you are never going to talk to me again — Mr. Whiteford knew what the problem was. The Court knew what the problem was, and the Court asked me to take the Eighty-five Thousand Dollars which Your Honor had put on the piece of paper and I stated that I would take this in respect of the Court and that I wanted exoneration, and you assured me, sir, that I would have this in the form of a judgment, and Court costs and it would be stipulated in the release. You then asked the Bailiff to have Mr. Sherbow come in and before Mr. Sherbow, Mr. Kernan and Mr. Shea could sit down, which I invited them to have a chair. You said, I think, Mr. Chertkof has accepted the settlement and before you could finish your sentence, sir, Mr. Sherbow said, and I will try to quote it as close as I can remember: "Payment in five years, ten is too long without interest." None of those things had ever been discussed prior [275] and then Mr. Sherbow took over and started to stipulate monthly payments. No judgment, and your counsel interrupted him and said, "Mr. Sherbow, there will be a judgment in the counter suit with Court costs."

THE COURT: For Court costs.

MR. CHERTKOF: For Court costs in favor of the defendant. Now, Your Honor, you have that Release before you. I would like for you to read that and see if anything that was said in chambers are included in that release. We have tried and I say we — Mr. Whiteford and myself — have tried to get this thing settled. We have leaned backwards to get this thing settled. When we left your chambers, assuming there was a meeting of the minds and an agreement had been reached. You said you fellows are good friends, meaning Mr. Klaff and Mr. Plant, go out and play golf and forget this whole thing. I have never had any malice against them. I have talked to them, and the fact is, I called Mr. Klaff one Wednesday, June 7th, at a quarter of six at his home and explained what had transpired in chambers because he wasn't present, and I told him it was a mistake. I have even sent Mr. Klaff a letter which I addressed to my attorney [276] and explained to him. Now, Your Honor, we have reached the point where the only thing that can be done is just to set this case for re-trial, and I think I am entitled to my day in Court, and this is what I ask Your Honor to grant me.

MR. SHERBOW: Now, if Your Honor please, I renew my motion, that I must say to you that I cannot allow this record to stand with such a series of statements in it. In great part they do not match the recollection of others. When Your Honor has before you that motion to strike out certain testimony, it lead to further discussions and thereupon with consent of counsel, you came into chambers and met with Mr. Chertkof and with Mr. Klaff and with Mr. Plant without their attorneys, but with their attorneys' permission.

THE COURT: In fact, at their suggestion.

MR. SHERBOW: And with their suggestion. At lunch-time you advised the parties that they could talk with their attorneys and go to lunch with them and come back and renew the discussions. In order to avoid the very thing that now comes before you, namely, what is your recollection and what is their

recollection, and what is anybody else's recollection, this is why the agreement was put in writing and dictated to [277] the Court Stenographer.

THE COURT: Well, I am disposed to agree that I should strike from the record anything that has been said so far as to non-compliance with the agreement. However, before making any final ruling on it, I want to be sure I understand what is in Mr. Chertkof's mind.

MR. SHERBOW: May I tell you what the differences were that we were asked to do?

THE COURT: Are they all in your motion on Page 3?

MR. SHERBOW: No, they're only in general form.

MR. WHITEFORD: This is getting down to a very narrow area finally.

MR. SHERBOW: We simply release in the usual form to Mr. Whiteford. At the end of the Release there was a statement, this is not an admission of liability on the part of either party, and no questions were raised until sometime after the discussions got under way with Mr. Kernan and with Mr. Whiteford. When Mr. Whiteford called me, we had a conversation and then he put in writing a letter to me in which he said that the clause in issue only read a part of it, that Mr. Chertkof wants in this release — reads: It is further [278] acknowledged that the allegations contained in the counter suit were without foundation, et cetera, et cetera. I told Mr. Whiteford this is the most extraordinary thing I had ever heard of. Not only was it something we never agreed upon, it was something we could never agree upon, but aside from the fact that this was an attack upon me and my firm, it also meant that the Glamorgan Company, whom we do not represent, was wide open to a suit for abuse of process because it is the company which has succeeded the Klaff's. Furthermore, having advanced these totally new ideas, we had already cancelled the presence of more than a half a dozen very expensive witnesses, expensive in the sense they were coming from all parts of the East. The matter was con-

cluded, we can't possibly get them back again. We are so adversely affected by the results of the case being settled and an attempt to re-open it, that if it were re-opened the adverse affect on us would be tremendous.

THE COURT: Well, may I interrupt you to this extent. Mr. Whiteford said a moment ago that he thought that the remaining dispute as to the consummation of the agreement made — now there was an agreement — has narrowed down to a [279] comparatively minor issue insofar as the extent is concerned, but apparently a matter of substance of recent importance to your client. Now, what is the remaining bone of contention that is holding up the consummation of the settlement?

MR. WHITEFORD: It has not been answered as Mr. Chertkof said, because I think those aspects of it were final and we had an understanding.

THE COURT: Is the only remaining question whether or not there should be in the release a complete repudiation of the allegations in the answers of the defendants in this case?

MR. WHITEFORD: It got down to a matter of semantics.

MR. SHERBOW: We think substance, not semantics.

MR. WHITEFORD: Let me conclude. The phrase that Mr. Sherbow read about without foundation, I myself questioned that. I myself questioned my client's objection to that at the time he objected to it.

MR. SHERBOW: Excuse me, I didn't read the rest of it because I didn't want to load up the record. The whole paragraph is a question of substance.

[280] MR. WHITEFORD: And explained why I thought Mr. Sherbow and his firm and client might have a reasonable objection to it, more than a reasonable objection to it, and then agreed with Mr. Sherbow without exchanging any writing on it, on some phraseology that would eliminate that particular part of it.

MR. SHERBOW: We didn't agree, you suggested it.

MR. WHITEFORD: But when that phraseology went to Mr. Chertkof, he reinserted his original phraseology excluding that particular objectionable phrase about it being without substance and the counter-claim, and then when that got back to Mr. Sherbow I think all his pent up steam sort of let out and he said it was too close to the original, that the whole thing had been a reflection on him and his law firm, and I think that was a well taken objection on his part. I think he was going back to his original agreement.

THE COURT: Does the Release as proffered by — prepared by Mr. Sherbow set forth precisely what was agreed upon at the time of settlement?

MR. WHITEFORD: To this, and I am speaking as Mr. Chertkof's advocate now, there is a minus factor to this extent. [281] It does not contain what Mr. Chertkof believed should be exoneration charges. In his belief the mere judgment in his favor as a defendant, does not fully satisfy him. Am I speaking correctly?

MR. CHERTKOF: Well, I understood there was going to be an exoneration clause in the release and I understood there was going to be a judgment in my favor, and nothing like that —

MR. WHITEFORD: There is a judgment in your favor in the counter-claim.

THE COURT: The stipulation which was entered into and agreed upon by counsel in the presence of and with the consent of all clients reads at Page 3 — "a judgment shall be entered in favor of the Defendant, Jack O. Chertkof, and the case of Harry G. Weiskittel Company, Incorporated, counter-claimant, Messrs. Jack O. Chertkof, counter-defendant, in the Superior Court, Docket 1964, folio 720, file 86761, and the judgment shall be for Court costs."

MR. SHERBOW: The contents of the Releases are described even in this agreement.

THE COURT: I think so. Nothing is said in this [282] stipulation as to any language which would state that there should be any retraction of any allegations in the pleadings, or that there should be exoneration

of either party, nor of any party. No, I do not think I would have power to insist that now be added. Let me see the proffered release. This is a Release filed under date of July 7 with the motion of Mr. Sherbow to force a settlement agreement. Mr. Whiteford, is there anything in this release contrary to the understanding arrived at in this stipulation filed in this case?

MR. WHITEFORD: If Your Honor please, it is not contrary to my understanding. It is contrary to my client's understanding in that it lacks something.

THE COURT: The only thing it lacks, if I may state it, is a personal exoneration.

MR. WHITEFORD: If Your Honor please, I said I wasn't going to try anymore. I told Mr. Chertkof this and I told these folks that. We were so close and it is language so innocuous I hate to see this terminated with residual bad feeling.

MR. SHERBOW: We don't think it is innocuous, we think it is highly serious. The release you have, we excised the [283] amounts from it. I would like to show you the original executed Release together with it, not all of which were prepared by us. At the moment they give us their Release, the order of the Court prepared and ready.

MR. WHITEFORD: I agree with it. The clause Mr. Sherbow found offensive should have come out, but over and beyond that, I think they express what Mr. Chertkof's understanding was with His Honor in chambers and with counsel and everybody. Am I speaking correctly?

MR. CHERTKOF: You are.

MR. SHERBOW: That is not any agreement that we ever concurred, nor was it an agreement that was made and the agreement of settlement does not include any such statement. Indeed, had it, I am sure the Court would have consummated it. The trial would have been concluded and the Jury's verdict rendered by now.

THE COURT: Well, gentlemen, it is my impression at this moment that the release executed though

not delivered by what I will refer to as the Weiskittel interests, accurately sets forth what they undertook to do insofar as their obligation to execute a release of any claims which they may have [284] against Mr. Chertkof and his interests. I think further, that the proffered release, unexecuted, which is now filed as a part of the record of the case accurately sets forth the agreement which Mr. Chertkof was to execute. The only matter not mentioned in either release, is in effect an apology. Now, where a settlement is made between parties apologies are normally not part of the consideration for the settlement. The stipulation entered into at the time the case was passed for settlement in June, June 8, to be exact, makes no reference whatever to that. Whatever discussions were had in chambers between the Weiskittel interests represented at that time by Messrs. Plant and Klaff on one hand, then with Mr. Chertkof on the other, were no part of this settlement agreement as evidenced by the printed stipulation. Now, I cannot insist under the circumstances that either release be modified so as to include what for want of a better term, I call an apology. I think if I were to do that, I would be quite arbitrary and unreasonable. I therefore feel that Mr. Chertkof ought to execute the Release. If he is not prepared to do so, I do not know that I have any power to order him to do so physically, and I don't propose [285] to exercise such power, but I think I do have power to direct that the judgment contemplated in the stipulation be entered and the case settled once and for all time, and make it a binding agreement upon all the parties on condition that the amounts of money specified in the stipulation, which was the settlement, shall be paid, and if that is not satisfactory to Mr. Chertkof, then the payments will be paid into the registry of the Court, subject to being drawn out upon the execution of the Release. I don't know that I have any alternative.

MR. SHERBOW: The only suggestion I might make to His Honor is that there has been in one instance, I think, in the Supreme Bench, a situation when the

Court ordered the Clerk, acting on behalf of the offending party to execute the release as trustee on his behalf, or named the trustee to do so on the grounds that one side shouldn't find themselves in the position of giving releases, the offending parties give no releases, but still get the benefit of it. But you have indicated that the order of the Court would be so broad as to amount to a release of all sides which would probably [286] solve that problem.

(Off-the-record discussion.)

THE COURT: I will ask you the question then categorically. Are you prepared to sign the Release proffered by counsel for the Weiskittel?

MR. CHERTKOF: No, sir.

THE COURT: Very well, have you a suggestion as to the proper way to dispose of this?

MR. SHERBOW: If Your Honor please, first, or at some point I will ask Your Honor to strike out this conversation by Mr. Chertkof, but since Your Honor has reached a conclusion which we think is proper that he should execute the Releases and he refuses, we suggest that there are two courses open. One, that the Court may have entered on the docket itself, or in the papers in this case, an order tantamount to releases of these parties and the rest of the material involved therein. We do not think this would be satisfactory to us because of the many problems involved in this case including an alleged stock interest which he claimed which was eliminated by the settlement of the case, and I mean alleged stock interest in the Glamorgan Corporation, [287] originally the Weiskittel Company, therefore, my suggestion, or our suggestion is that the Court appoint a trustee to execute the releases on behalf of Jack O. Chertkof and his Corporation. That the papers be filed and entered in the case agreed and settled, enter the counter-claim judgment for the defendant upon the payment of costs, which we are ready to do that, the executed releases by our party be filed in the case. That a trustee be appointed to execute the releases for Mr. Chertkof and the Corporation, and that there-

upon all of the papers be sealed with the further provision that the payments in accordance with the terms of the settlement be paid into the registry of the Court, that no payment be made to Mr. Chertkof until he complies with the terms of the agreement, and executes the releases.

THE COURT: Let me ask you this question. If a trustee were appointed to execute the Releases for Mr. Chertkof, would he not be authorized to disburse the funds from time to time after Release is executed by him as trustee for Chertkof?

MR. SHERBOW: I would have no objection to that if there was no challenge to his right as trustee to execute [288] the release, but I think it would be inconceivable as trustee there would be an attack on his right to execute the Release, but as trustee Mr. Chertkof could get the proceeds from the trustee.

THE COURT: The trustee would be acting at the direction of the Court.

MR. SHERBOW: I am simply trying to say this is an abominable situation because I don't know what Mr. Chertkof may do next. If he challenges the right of the trustee to execute the Release, then I don't think the trustee, having executed it, should pay him the money from it until whatever challenges there are are disposed of.

THE COURT: I understand that. If he does that, the money would be held up, but suppose he does not?

MR. SHERBOW: Then I think the Releases are then in proper form. He then — we would ask the Court further to make a finding that the settlement was agreed to, consented to, that he is now estopped to deny that there was an effective settlement. Appoint the trustee and let us pay the money to the Court. Enter the order in the case.

THE COURT: Who would be trustee?

[289] MR. SHERBOW: I would suggest, Your Honor, to name anyone you can think of at the moment. The Court Clerk could do it and pay it into his registry and as the trustee would execute it and you would assume, I assume, give him the right to

disburse it to execute the release had been disposed of it there should be such a challenge.

THE COURT: Mr. Whiteford, do you care to comment?

MR. WHITEFORD: I don't have any comments.

THE COURT: All right, Mr. Chertkof has stated that he will not execute a Release either on his own behalf individually, or on behalf of his firm, known as the offices of J. O. Chertkof.

MR. SHERBOW: Excuse me, Your Honor, may I interrupt you and say we would have all papers sealed.

THE COURT: Yes, I understand that.

MR. WHITEFORD: I assume that you followed all of this and understand it clearly, but do you want me to reexpress it?

MR. CHERTKOF: I don't understand it, but I will understand it later. I will discuss it later.

THE COURT: All right, the Court is of the opinion [290] that the releases drawn and proffered, one of which has already been executed by the Weiskittel interests, the other is Mr. Chertkof's, and he refuses to execute it, was the agreement that was entered into by counsel for the parties in this Court — and reduced to typewritten form on June 8, 1967. I am of the opinion that Mr. Chertkof should execute the release proffered him and that he is estopped now to deny the release set forth in the agreement entered into. I will therefore grant the motion to enforce the settlement agreement and will appoint a trustee for the purpose of executing the proffered release on behalf of Chertkof and the Chertkof interests.

MR. KERNAN: Excuse me, will it be necessary for the Clerk to execute an order of satisfaction on behalf of Mr. Chertkof?

THE COURT: The trustee?

MR. KERNAN: Yes.

THE COURT: And the trustee will execute an order of satisfaction to be filed with the records of the Court. Now, the mention of appointment of a trustee gives me a little concern, but I am going to direct that Mr.

Sherbow [291] and his partners who are present here today, Messrs. Shea and Kernan, nominate a trustee and that Mr. Whiteford, on behalf of his client, nominate another, and I will ask you to agree on which of the two should be the trustee and if you don't agree, I will simply have to select one or the other, or a third one if I find either to be unsatisfactory. I would much prefer that the person to be the trustee, be someone known to the parties and in whom the parties have confidence rather than selecting someone from without. I think the advantages of this are twofold: The first is that, there is the advantage advocated by Mr. Sherbow, and mainly this will have the effect of taking care of any possible claims to Glamorgan and stopped by Mr. Chertkof. On the other hand, I think it has an advantage insofar as Mr. Chertkof is concerned if he continues to refuse to execute the release because the trustee will be empowered to collect the money under the jurisdiction of the Court and the other money, if Mr. Chertkof still refuses to sign a release, he will no doubt be ordered to invest and re-invest the money so it will be income producing.

MR. WHITEFORD: I don't think that follows the suggestion.

[292] THE COURT: Why not?

MR. WHITEFORD: I think the suggestion was that the Clerk disburse the money to Mr. Chertkof unless Mr. Chertkof challenges it.

THE COURT: If the Clerk is designated as the trustee —

MR. WHITEFORD: Otherwise it would be a mechanical routine thing.

THE COURT: If that is the case, if that is satisfactory, I will simply designate the Clerk of Superior Court as trustee, or one of his deputies.

MR. SHERBOW: As far as we are concerned, if you name Mr. Carney, or one of the deputies —

MR. WHITEFORD: Unless Mr. Chertkof disputes his rights to act for it, the Clerk would mechanically receive and disburse.

THE COURT: No, he would not. If he executed a release, I suppose he would.

MR. SHERBOW: If Your Honor please, I am not willing to say that a man ought to enter an agreement and profit by it and sit back and say I didn't sign the release, [293] but I am getting all the money from it. I think the question of what you do with the money is a matter which will come before the Court at the appropriate time. If there is no challenge to the release, to all of these proceedings, that there is no challenge to it, I am sure we are all disposed to be very practical about it, but I shall wait to see what he does under the circumstances.

MR. WHITEFORD: I do point out to His Honor it is inconsistent to appoint a trustee to execute and receive, and still not give the trustee the right to disburse. The trustee is acting in effect as an alter ego, and to add an additional condition to it that Mr. Chertkof has to show up here one of these days, I think, is adding a burden that I don't think was originally suggested by Mr. Sherbow even.

MR. SHERBOW: If Your Honor please, I simply say this. I left it at that, but I do think that the papers ought to contain a provision that the disbursement by the trustee shall be under the supervision and by order of the Court. Your Honor will be here a long time and I am sure by that time within the next two or three months, the matter will be disposed of one way or the other. Either Mr. Chertkof [294] will execute the release, or the Court will then decide what is to be done with the money.

THE COURT: I don't propose to pass on that question until it arises. I am instructing you, Mr. Sherbow, to prepare a paper, an appropriate order, for the designation of a trustee, and I would assume that you could nominate the Clerk of The Court, or one of his deputies. I will leave that to your discretion.

MR. WHITEFORD: James Carney is satisfactory to me.

MR. SHERBOW: If that is in the record —

THE COURT: It may not be satisfactory to Mr. Carney, I don't know. You may confer with him.

MR. SHERBOW: We will confer with Mr. Carney, or if he wishes to name one of his deputies, we don't care who he names, this is satisfactory to us.

THE COURT: I think Mr. Carney may be on his vacation next week and possibly this week.

MR. SHERBOW: Mr. Bouse would be all right with us. In the event Mr. Carney is not available, we would nominate Mr. Robert Bouse, who is Clerk or Deputy Clerk of the Superior Court, would that be satisfactory to the Court as to [295] the individual?

THE COURT: Perfectly satisfactory. I have a great deal of confidence in Mr. Bouse, as well as in Mr. Carney.

MR. SHERBOW: If we don't find Mr. Carney, we will see Mr. Bouse and ask him to serve.

THE COURT: Prepare the order and submit it to Mr. Whiteford to consider as to form and legal sufficiency, on behalf of his client. Perhaps he cannot agree to it as such, but as to form and legal sufficiency he certainly could.

[Filed August 1, 1967]

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Motion to Enforce Settlement Agreement filed herein by Defendant and Counter-Claimant having come on for hearing on July 20, 1967, Plaintiff and Counter-Defendant having stipulated that he did not wish to file any responsive pleadings to said Motion, the Court having considered the evidence and arguments of counsel makes the following findings of fact and conclusions of law:

1. On June 5, 1967 trial of the above entitled case began before Honorable J. Gilbert Prendergast and a jury.

2. On June 7, 1967 the parties agreed in the presence of the Court that the case of Chertkof vs. Weiskittel was settled and that a judgment in favor of Chertkof for court costs would be entered in the case of Weiskittel vs. Chertkof.

3. On June 8, 1967 the agreement of settlement was dictated to the Court Reporter and thereafter transcribed. A copy is attached hereto as Exhibit No. 1.

4. After the settlement agreement was entered into by the parties, the Court ordered the withdrawal of a juror and declared a mistrial.

5. In accordance with, and in compliance with the settlement agreement:

a. Defendant and Counter-Claimant executed a complete and total release of Jack O. Chertkof, individually, and the Offices of J. O. Chertkof Co., a body corporate, concerning any and all matters growing out of this case. Said Release is attached hereto as Exhibit No. 2.

b. H. Klaff & Co. executed a promissory note in favor of Jack O. Chertkof whereby the sum of $85,000.00 was to be paid as more fully appears from said note which is attached hereto as Exhibit No. 3.

c. Defendant and Counter-Claimant consented to an Order that Counter-Defendant have judgment against Counter-Claimant for court costs in the case of Harry C. Weiskittel Co., Inc., v. Jack O. Chertkof. A copy of said proposed Order is attached hereto as Exhibit No. 4.

6. The Plaintiff and Counter-Defendant although required by the settlement agreement has failed and refused to execute a Release of the Defendant and Counter-Claimant (a copy of said Release is attached as Exhibit No. 5) and has failed and refused to execute the Order of Satisfaction (a copy of said Order is attached as Exhibit No. 6) required by the settlement

agreement. Counsel for Plaintiff and Counter-Defendant at the hearing hereon stated that said Release accurately reflected his understanding of the settlement agreement.

7. At the hearing held before the Court on the Motion to Enforce Settlement Agreement, Plaintiff and Counter-Defendant offered oral testimony attempting to change the settlement agreement entered into by the parties. The Defendant and Counter-Claimant moved to strike out said testimony.

8. The settlement agreement entered into by the parties in the presence of the Court is a binding contractual obligation on all parties to this case.

9. The Plaintiff and Counter-Claimant is estopped to deny that an effective settlement was agreed to by him.

10. The Release and Order of Satisfaction attached as Exhibits Nos. 5 and 6 are in accordance with the settlement agreement entered into by the parties.

In conformity with the above findings of fact and conclusions of law it is this 1st day of August, 1967,

ORDERED, ADJUDGED AND DECREED:

1. That Robert H. Bouse be, and he is hereby aapointed Trustee for Jack O. Chertkof, individually, and The Offices of J. O. Chertkof Co., a body corporate, and shall as said Trustee execute the Release and Order of Satisfaction, attached hereto as Exhibits Nos. 5 and 6. Robert H. Bouse, as Trustee shall file with the Court under seal said Release and Order of Satisfaction shall be entered on the Docket and filed with the court papers in this case.

2. The Release, executed by the Defendant and Counter-Claimant and others attached hereto as Exhibit No. 2, shall be filed by Defendant and Counter-Claimant under seal with the Court.

3. Order attached as Exhibit 4 shall be filed with the Clerk of the Court forthwith, and judgment for court costs shall be entered for the Plaintiff and Counter-Defendant in the case of Harry C. Weiskittel Co., Inc., Counter-Claimant vs. Jack O. Chertkof, Counter-Defendant, Docket 1964, Folio 720, File No. 86761 and court costs shall be paid by the Defendant and Counter-Claimant.

4. The Defendant and Counter-Claimant shall pay to Robert H. Bouse, Trustee, the agreed upon amounts provided for in the promissory note attached hereto as Exhibit No. 3 and shall comply with the terms of said note which shall be filed with the Court under seal. Robert H. Bouse Trustee, shall pay into the registry of this Court said sums as they are paid to him as Trustee.

5. No payments shall be made from the amounts paid into the registry of the Court by the Trustee without the prior approval of the Court.

6. Fees and costs incurred by the Trustee shall be paid upon the prior approval of the Court from the funds in the registry of the Court.

7. Defendant and Counter-Plaintiff's motion to strike the testimony of Jack O. Chertkof at the hearing on the Motion to Enforce Settlement Agreement held on July 20 is hereby overruled.

/s/ J. Gilbert Prendergast
Judge

APPROVED AS TO FORM:

/s/ W. Hamilton Whiteford
Attorney for Plaintiff and
Counter-Defendant

[Filed August 1, 1967]

[EXHIBITS TO COURT'S "FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER]

EXHIBIT NO. 1

IN THE SUPERIOR COURT
OF BALTIMORE CITY

JACK O. CHERTKOF
19 W. Franklin Street
Baltimore, Maryland 21201

Plaintiff

vs.

HARRY C. WEISKITTEL CO., INC., a body corporate of the State of Maryland, 4901 Pulaski Highway, Baltimore, Maryland 21224

Defendant

- - - -

86761/1964/720

HARRY C. WEISKITTEL CO., INC., a body corporate of the State of Maryland, 4901 Pulaski Highway, Baltimore, Maryland 21224

Counter-Plaintiff

vs.

JACK O. CHERTKOF,
19 W. Franklin Street
Baltimore, Maryland 21201

Counter-Defendant

* * * * *

June 8, 1967

APPEARANCES:

W. Hamilton Whiteford, Esquire
On behalf of the Plaintiff
Joseph Sherbow, Esquire
On behalf of the Defendant
Robert W. Kernan, Esquire & Edward A. Shea, Jr., Esq., on behalf of the Defendant

[260] MR. SHERBOW: The parties represented by counsel in the Court's chambers in the presence of His Honor, Judge Prendergast, stipulate and agree as follows: A juror shall be withdrawn, a mistrial declared and the case continued upon the following conditions:

The parties shall perform the following acts: When we refer to parties and say Chertkof, we mean Jack O. Chertkof and the offices of J. O. Cherkof, Incorporated, and for convenience will be referred to only as Chertkof. When we refer to Weiskittel, it is meant to include and shall include Weiskittel Pipe & Foundry Co., Inc. H.C.W. Realty Corp., Harry C. Weiskittel Co., Inc., Glamorgan Pipe and Foundry Co., Inc. a [261] body corporate, and Companies de Pont-a-Mousson, its subsidiaries and affiliated corporations, H. Klaff and Co., Inc., Jerome H. Klaff, Marvin S. Plant, Morton B. Plant, Arnold Plant, and all Officers, Directors, and employees of all of these companies and their employees, agents, and servants, and for convenience they all will be referred to by just the one word - Weiskittel - but it is meant to include all of them. The releases hereafter referred to in all of these papers shall include heirs and assigns of all individuals and successors, and assigns of all corporate entities. A judgment shall be entered in favor of the Defendant, Jack O. Chertkof in the case of Harry C. Weiskittel Co., Inc. Counter-Claimant vs. Jack O. Chertkof, Counter-Defendant in the Superior Court, Docket 1964, Folio 720, File 86761. And the judgment shall be for court costs. When all matters herein referred to are completed, the case of Jack O. Chertkof, Plaintiff vs. Harry C. Weiskittel Co., Inc., Defendant shall be en-

tered as agreed, settled and satisfied. Both orders relating to these 2 cases shall be entered simultaneously. When we refer to matters being concluded, we mean when all papers are executed. Chertkof shall [262] execute full and complete general releases of every nature and description for claims he may have, or does have, against Weiskittel as herein expressed for any claim no matter how arising, or including any claim he may have for any stock of any company above referred to, or for any profit sharing. It is understood that the releases shall be full and complete, and the enumeration of these items does not mean that these are the only matters referred to. To repeat, the releases shall be full, complete and general.

Weiskittel shall execute all releases to Chertkof of all claims Wieskittel may have against Chertkof. It is not contemplated that Companies, de Pont-a-, Mousson shall sign or execute any release. The parties agree that when the orders are entered in these cases, no appeals will be taken by any parties to any Court, in order that the judgments and order of agreed and settled shall be final, conclusive and complete. H. Klaff and Co., Inc. shall execute a written obligation to Jack O. Chertkof for $85,000 payable over a period of 5 years at the rate of $17,000 a year in quarterly installments of $4,250 each, without interest, with the right on the part of H. Klaff and Co., Inc. to [263] anticipate any portion or all of said obligation at any time without penalty. First quarterly payment shall be made three months after filing of the orders in Court. The parties agree that no portion of these statements will be released to the press, to Dun and Bradstreet, or any credit agencies, and shall not be filed in this case.

MR. WHITEFORD: At this point, I better note that Chertkof will have the right and privilege of having a copy of this memorandum upon his assurance and that of his counsel, he will not use it for purposes heretofore prescribed, and that further he will be entitled to receive a copy of the transcript of all pro-

ceedings in Court as transcribed by the official court reporter on June 7th.

MR. SHERBOW: At Chertkof's costs. The order of agreed, settled, and satisfied in the case of Chertkof vs. Weiskittel shall be filed, and court costs shall be paid by the Defendant.

THE COURT: Do you wish to set any time limit in which settlement will be consummated?

MR. SHERBOW: All papers shall be executed and filed within 30 days from this date, June 8, 1967.

[Filed August 1, 1967]

EXHIBIT NO. 2

RELEASE

KNOW ALL MEN BY THESE PRESENTS:

In consideration of the payment of the sum of Five ($5.00) Dollars and other good and valuable consideration, the receipt of which is hereby acknowledged, H. Klaff & Co., Inc., a body corporate, Jerome L. Klaff, Marvin S. Plant, Morton B. Plant, Arnold Plant, Glamorgan Pipe & Foundry Co., Inc., a body corporate, and as such body corporate and as successor corporation to Harry C. Weiskittel Co., Inc., Weiskittel Pipe & Foundry Co., Inc., and the H.C.W. Realty Corporation, individually, and their respective directors, officers, agents, employees, heirs, executors, administrators, successors and assigns, and any subsidiary of affiliated persons, firms or corporations, hereinafter referred to for the purposes of this Release as Weiskittel, does hereby remise, release and forever discharge Jack O. Chertkof, individually, and The Offices of J. O. Chertkof, Co., a body corporate, and their respective directors, officers, agents, employees, heirs, executors, administrators, successors and assigns and any subsidiary or affiliated persons, firms or corporations, hereinafter referred to for the pur-

poses of this Release as Chertkof, from any and all claims, actions, suits, debts, accounts, covenants, contracts, controversies, damages, judgments, and demands whatsover in any court, State or Federal, at law or in equity, and specifically, but without limitation, any and all claims, actions or demands connected with or arising from the litigation entitled "Jack O. Chertkof, Plaintiff, vs. Harry C. Weiskittel Co., Inc., Defendant, and Harry C. Weiskittel Co., Inc., Counter-Claimant, vs. Jack O. Chertkof, Counter-Defendant, in the Superior Court of Baltimore City, Docket 1964, folio 720, File No. 86761" and the said Weiskittel does further remise, release and forever discharge Chertkof from any and all claims, actions or demands connected with or arising from the written agreement dated June 28, 1963 between Jack O. Chertkof and Harry C. Weiskittel Co., Inc. or any oral agreement prior or subsequent thereto between Jack O. Chertkof and/or The Offices of J. O. Chertkof Co., and any of the parties named in this Release and the said Weiskittel does further remise, release and forever discharge Chertkof from any and all other claims, actions or demands, including stock, profit and/or compensation of any kind, which the said Weiskittel may have against the said Chertkof from the beginning of the world to the date of the execution of this Release.

Weiskittel in further consideration of the payment of the said sum herein referred to, covenants and agrees that Weiskittel will not hereinafter institute any claim, action or demand for damages or other relief, at law or equity, against Chertkof, which is expressly or impliedly related to or in any way connected with, either directly or indirectly, the facts and circumstances which give rise to the litigation entitled, "Jack O. Chertkof, Plaintiff, vs. Harry C. Weiskittel Co., Inc., Defendant, and Harry C. Weiskittel Co., Inc., Counter-Claimant, vs. Jack O. Chertkof, Counter-Defendant, in the Superior Court of Baltimore City, Docket 1964, Folio 720, File No. 86761"

and the Weiskittel further agrees to execute any and all orders of satisfaction, notices and orders of dismissal or other instruments necessary to dispose of and conclude the above referred to litigation.

IN WITNESS WHEREOF, This Release is hereby executed this 1st day of August, 1967.

WITNESS:	GLAMORGAN PIPE & FOUNDRY CO., INC.
/s/ James D. Bailey, Jr.	/s/ W. W. Winfree President
	H. KLAFF & CO., INC.
	/s/ Jerome L. Klaff President
Pauline Cain as to all	/s/ Jerome L. Klaff
	/s/ Marvin S. Plant
	/s/ Morton B. Plant
	/s/ Arnold Plant

[Filed August 1, 1967]

EXHIBIT NO. 3

$85,000.00 Baltimore, Maryland
August 1, 1967

The undersigned promises to pay to the order of Jack O. Chertkof, the sum of $85,000.00 in lawful money of the United States of America, in consecutive quarterly installments of Forty-Two Hundred and Fifty ($4250.00) Dollars each, without interest, the first payment being due three (3) months from the date hereof, and each payment shall be due in consecutive quarterly installments thereafter, with the right to the undersigned, its successors and

assigns, to anticipate all or any portion of the unpaid sums due hereunder without penalty. If any payment of any quarterly installment is not made when due, then the payee, his heirs, personal representatives, or assigns, shall give the undersigned, its successors and assigns, thirty (30) days notice in writing of such default, and if the payment then in default is not made within ten (10) days after the expiration of said thirty (30) days notice, then the entire balance due hereunder shall be due and payable.

Witness the corporate seal of the maker and the signature of its President.

H. KLAFF & COMPANY, INC.

/s/ Jerome L. Klaff
President.

[Filed August 1, 1967]

EXHIBIT NO. 4

ORDER

In conformity with the agreement of the parties it is:

ORDERED, this 1st day of August, 1967 that Counter-Defendant have judgment against Counter-Claimant for court costs.

/s/ J. Gilbert Prendergast
Judge

[Filed August 1, 1967]

EXHIBIT NO. 5

RELEASE

KNOW ALL MEN BY THESE PRESENTS:

In consideration of the execution of a promissory note by H. Klaff & Co., Inc. in the amount of Eighty-Five Thousand ($85,000.00) Dollars, payable over a period of five (5) years at the rate of Seventeen Thousand ($17,000.00) Dollars a year in consecutive quarterly installments of Four Thousand Two Hundred Fifty ($4,250.00) Dollars each, without interest, and with the right on the part of the H. Klaff & Co., Inc. to anticipate any portion or all of said obligation at any time without penalty, and for other good and valuable consideration, receipt of which is hereby acknowledged, Jack O. Chertkof, individually, and The Office of J. O. Chertkof Co., a body corporate, their respective directors, officers, agents, employees, heirs, executors, administrators, successors and assigns and any subsidiary or affiliated persons, firms or coprorations, hereinafter referred to for the purposes of this Release as Chertkof, do hereby remise, release and forever discharge Harry C. Weiskittel Co., Inc., a body corporate, Weiskittel Pipe & Foundry Co., Inc., a body corporate, Glamorgan Pipe & Foundry Co., Inc., a body corporate, Companies de Pont-a-Mousson, its subsidiaries and affiliated corporations, the H.C. W. Realty Corporation, a body corporate, H. Klaff & Co., Inc., a body corporate, Jerome L. Klaff, Marvin S. Plant; Morton B. Plant, Arnold Plant, individually and their respective directors, officers, agents, employees, heirs, executors, administrators, successors and assigns, and any subsidiary or affiliated persons, firms or corporations, hereinafter referred to for the purposes of this Release as Weiskittel, from any and all claims, actions, suits, debts, accounts, covenants, contracts, controversies, damages, judgments, and demands whatsoever in any court, state or federal, at law or in equity, and spe-

cifically, but without limitation, any and all claims, actions or demands connected with or arising from the litigation entitled, "Jack O. Chertkof, Plaintiff vs. Harry C. Weiskittel Co., Inc., Defendant, and Harry C. Weiskittel Co., Inc., Counter-Claimant, vs. Jack O. Chertkof, Counter-Defendant, in the Superior Court of Baltimore City, Docket 1964, Folio 720, File No. 86761" and the said Chertkof does further remise, release and forever discharge Weiskittel from any and all claims, actions or demands connected with or arising from the written agreement dated June 28, 1963 between Jack O. Chertkof and Harry C. Weiskittel Co., Inc. or any oral agreement prior or subsequent thereto between Jack O. Chertkof and/or The Offices of J. O. Chertkof Co., and any of the parties named in this release and the said Chertkof does further remise, release and forever discharge Weiskittel from any and all other claims, actions or demands including stock, profits and/or compensation of any kind which the said Chertkof may have against the said Weiskittel from the beginning of the world to the date of the execution of this release.

The said Chertkof in further consideration of the execution of the promissory note by H. Klaff & Co., Inc., in the amount of Eighty-Five Thousand ($85,000.-00) Dollars and other good and valuable consideration hereinabove referred to, covenants and agrees that Chertkof will not hereinafter prosecute any claim, action or demand for damages or any other relief at law or in equity against the said Weiskittel which is expressly or impliedly related to or in any way connected with either directly or indirectly the facts and circumstances which gave rise to the litigation entitled, "Jack O. Chertkof, Plaintiff, vs. Harry C. Weiskittel Co., Inc., Defendant, and Harry C. Weiskittel Co., Inc., Counter-Claimant, vs. Jack O. Chertkof, Counter-Defendant, in the Superior Court of Baltimore City, Docket 1964, Folio 720, File No. 86761" and the said Chertkof further agrees to execute

any and all orders of satisfaction, notices and orders of dismissal or other instruments necessary to dispose of and conclude the above referred to litigation.

IN WITNESS WHEREOF, this Release is hereby executed this 2nd day of August, 1967.

WITNESS:

/s/ Edward G. Janos

/s/ Robert H. Bouse, Trustee
Jack O. Chertkof, By Robert H. Bouse, Trustee

THE OFFICES OF J. O. CHERTKOF By Robert H. Bouse, Trustee

/s/ Robert H. Bouse, Trustee

[Filed August 1, 1967]

EXHIBIT NO. 6

ORDER

MR. CLERK:

Please enter the above entitled case "Agreed, Settled and Satisfied" upon payment of the costs by the Defendant.

/s/ Robert H. Bouse, Trustee
Jack O. Chertkof
Plaintiff, by Robert H. Bouse
Trustee

APPENDIX B

IN THE COURT OF APPEALS OF MARYLAND

No. 404

September Term, 1967

JACK O. CHERTKOF

v.

HARRY C. WEISKITTEL CO., INC.

Hammond, C. J.
Marbury
McWilliams
Finan
Singley
Smith,

JJ.

Opinion by Hammond, C. J.

[Filed: December 4, 1968]

The appellant Chertkof, an engineer, sued the Weiskittel company for $135,000 claimed to be due him under a written agreement employing him as an engineering and production consultant, and Weiskittel counter-claimed alleging in case one that Chertkof's incompetent failures and wasteful deficiencies in performance constituted a breach of his express and implied warranties that he was qualified and able to perform the engineering and design services he had con-

tracted to perform, and in case two that he had been negligent, careless and reckless in attempting to perform agreed obligations, all with resultant large damages to Weiskittel, claimed to be $500,000.

The case came to trial in the Superior Court of Baltimore City before Judge Prendergast and a jury. The first – and as it turned out the only – witness was Chertkof, who testified the first day of the trial and most of the next day. A question as to the admissibility of evidence on negotiations between the parties came up and at that point counsel for both sides and the court apparently foresaw a revival of the possibility of settlement. When court convened on the third day, Judge Prendergast was urged by all the lawyers to see if the case could be settled. The jury was asked to retire and the judge met with counsel and then, at counsel's suggestion and with their full approval and consent, met in chambers with Chertkof and two Weiskittel principals for an initial interval of two hours, during which Chertkof says:

> "I think I impressed on the Court that the first prime consideration would have to be exoneration from the counter-claim, and the Court tried to assure me that this would be in the form of a release and a judgment in favor of the defendant in the counter-claim. We didn't reach the monetary aspect of the case, or settlement until [Judge Prendergast] gave us permission to talk to our counsels and discuss that aspect."

Judge Prendergast suggested that the parties go to lunch with their respective lawyers to review and consider what had transpired during their meeting with him and this suggestion was followed.

After lunch counsel conferred with the judge and then were replaced in chambers by the parties for a further discussion. Then the parties came out and counsel went in and, after a bit, counsel came out into the courtroom and Mr. Hamilton Whiteford, Chertkof's lawyer, handed Chertkof a piece of paper on which the court had written a sum which might serve as a basis for settlement – $85,000 – and Chertkof says:

> "I stated I would take this in respect of the Court and that I wanted exoneration, and you assured me, sir [Judge Prendergast], that I would have this in the form of a judgment, and Court costs and it would be stipulated in the release."

This statement of acceptance of the amount suggested by the Court and of the proposed exoneration was made in chambers in the presence of counsel and the Court and other details of the proposed settlement similarly were made known. It was then late in the day so it was further agreed that there would be a meeting in the morning, at which the terms of the agreement of settlement would be dictated to the court reporter.

In the morning Chertkof's lawyer and Weiskittel's lawyers appeared before Judge Prendergast in his chambers. Chertkof's lawyer advised the court that Chertkof would not attend but would like a copy of the transcript of the proceedings in open court and a copy of the settlement stipulation.

Weiskittel's lawyer dictated to the reporter the terms of the agreement reached the day before. Chertkof's lawyer did not object to the terms of the agreement as dictated nor did he indicate or suggest that what was dictated was not a complete and accurate expression of what had been agreed on.

When the dictation ended, Judge Prendergast advised the jury that "an amicable disposition of these cases has been entered into by the parties and their counsel," ordered the withdrawal of a juror and declared a mistrial.

The settlement agreement provided that (a) the original case would be entered agreed and settled and a judgment for costs entered in favor of Chertkof on Weiskittel's counter-claim against him; (b) general releases would be executed by all parties and exchanged; (c) no appeals would be taken; (d) Chertkof would be given a writing obligatory for $85,000 payable, without interest, in quarterly installments over a period of five years, with the right of prepay-

ment at any time without penalty; the first payment would be due three months after the filing of the orders in court; and (f) the parties would not release any part of the terms agreed to to the press, Dun and Bradstreet or any other credit agency or file them in the case.

In due time the papers carrying out the settlement were forwarded to Chertkof's lawyer. Chertkof then claimed three changes should be made: (1) he wanted, as the court later characterized it, an "apology" in the release in the following explicit form: "It is further acknowledged that the allegations contained in the counter-suit were without foundation"; (2) he wanted Weiskittel to give up the right to prepay the $85,000; and (3) he wanted the first payment to be accelerated from three months to one month.

Weiskittel would not agree to the proposed changes, taking the position that a general release and a judgment for costs on the counter-claim were all that had been agreed to, and that the language requested would unjustifiably imply unethical conduct on the part of its lawyers who filed the counter-claim and expose its corporate successor to a possible suit for abuse of process. It saw no need or justification for giving up a right to prepay or a delay in time of payment which had been precisely agreed on.

After tender on its part and several unsuccessful demands on Chertkof for performance of his agreement, Weiskittel on July 7, 1967, filed a motion for enforcement of the settlement agreement. A hearing on the motion was held July 20, at which Chertkof and his lawyer appeared. Mr. Whiteford told the court that no answer to the motion would be filed but he wanted Chertkof to explain for himself why he felt he should not sign the settlement papers. Counsel for Weiskittel objected on the ground that the parties and their lawyers had come to a complete agreement which had been approved by the court and "any testimony now of any character relating to subsequent matters would be improper and have no bearing on the case." Mr. Whiteford replied

that he wore two hats – one as Chertkof's advocate who "argues very strenuously that Mr. Chertkof has a perfect right to explain why he does not want to sign a release," and the other as an attorney in litigation who had participated in the settlement of that litigation and who, as such, could not in good conscience object to Weiskittel's objection.

Mr. Whiteford then told the court that Chertkof was dissatisfied because under the terms of the agreement "he was entitled to exculpation from the charges made against him [in the] countersuit * * * and that the verdict in the counter-claim does not duly fulfill that purpose."

The court then heard from Chertkof who amplified at some length essentially what we have quoted earlier. Counsel for Weiskittel were then heard, during which there was recorded a question by the court to Mr. Whiteford as to whether there was anything in the release to Chertkof "contrary to the understanding arrived at in this stipulation * * *" and his reply was that "it is not contrary to my understanding." It is contrary to my client's understanding in that it lacks something."

Judge Prendergast's impression at the conclusion of the hearing was that the release to Chertkof,

> "and accurately sets forth what * * * they [Weiskittel] undertook to do insofar as their obligation to execute a release of any claims which they may have against Mr. Chertkof * * *. The only matter not mentioned * * * is in effect an apology. Now, where a settlement is is made between parties apologies are normally not part of the consideration for the settlement * * *. I cannot insist * * * that either release be modified so as to include what for want of a better term, I call an apology. I think if I were to do that, I would be quite arbitrary and unreasonable. I therefore feel that Mr. Chertkof ought to execute the Release."

Judge Prendergast later made formal findings of fact and conclusions of law, including a finding that on June 7 "the parties agreed in the presence of the Court that the case of *Chertkof v. Weiskittel* was settled and that a judgment in favor of Chertkof for court costs would be entered in the case of *Weiskittel v. Chertkof*," a finding that on June 8 "the agreement of settlement was dictated to the Court Reporter and thereafter transcribed," and a finding that "the settlement agreement entered into by the parties in the presence of the Court is a binding contractual obligation on all parties to this case," and a finding that the release to Chertkof was in accordance with the settlement agreement.

The court appointed a trustee to execute for Chertkof a release and order of satisfaction to Weiskittel, ordered the filing of Weiskittel's release to Chertkof and the entry of a judgment for costs in favor of Chertkof and the payment of that judgment by Weiskittel, as well as the payment by Weiskittel of the agreed amounts to the trustee, to be paid into the registry of the court.

Chertkof makes two contentions. The first, in several subdivisions, is that no valid or enforceable settlement agreement was ever reached because the trial court's participation in the negotiations vitiated any possible agreement, there was no meeting of the minds as to exoneration, the agreement dictated on June 8 to the court reporter for several reasons was not, and did not purport to be, in itself an agreement but only a formal recording of what counsel and the court thought the agreement made the day before had been, and in any event the stipulation could not have been an independent agreement because Chertkof's lawyer was not authorized to settle for less than the apology from Weiskittel and could not legally bind his client to do so.

Weiskittel argues that (1) the parties agreed on June 7 to execute a written contract on June 8, that the dictation was a complete and accurate integration of the earlier oral agreement and parol evidence to vary it should not be heard or considered since Weiskittel is entitled to a conclusive

presumption that Chertkof's lawyer was authorized to act for him in settling the litigation; (2) the oral agreement of June 7 is binding in any event, without regard to the integration of June 8 and the trial judge properly so found; and (3) the trial judge was guilty of no impropriety or error in (a) participating in and aiding the settlement or (b) in deciding the motion to enforce the settlement; and (4) Chertkof did not challenge the judge's actions below and, therefore, did not preserve these questions for appellate review.

We find it unnecessary to pass on the contentions of the parties seriatim for in our view Judge Prendergast was guilty of no impropriety or error in participating in and aiding the settlement negotiations or in deciding the motion to enforce the settlement agreement and his findings of fact that Chertkof made a binding contract to settle on June 7 and that the dictated stipulation of June 8 accurately and fully expressed the terms of the contract of June 7, as well as the finding that the release to Chertkof included all that had been agreed to are not only not shown to have been erroneous but are soundly supported by the record.

Courts look with favor upon the compromise or settlement of law suits in the interest of efficient and economical administration of justice and the lessening of friction and acrimony. Often a trial judge can be the catalyst in producing a settlement and if he acts as a true catalyst that merely initiates or permits a reaction without itself changing or becoming part of the reaction, he remains an unchanged, fair and impartial judge and cannot be legitimately criticized. A judge seeking to aid in settlement must be careful not to indicate bias, prejudice or strong feelings, must be impartial and must not force his will upon or unduly press his views upon the parties; generally, he should act through counsel and not deal with the parties alone. We think that Judge Prendergast acted as a judicial catalyst should act and entirely properly. The suggestion that he attempt to promote settlement and that he confer alone with the parties came from counsel for both sides and had their full approval.

Counsel were fully advised of what was transpiring from time to time during the negotiations by the judge, and the parties were sent by the judge to confer with their lawyers as the negotiations progressed. There is nothing to even hint that there was bias, prejudice, strong feeling or lack of impartiality on the part of Judge Prendergast or that he sought to force his will upon or pressure either side. Nothing he did in this regard vitiated or impaired the settlement reached. See Annotation–Judges Comments–Urging Settlement, 6 A.L.R.3d 1457 and particularly § 5, "Comments out of court; in chambers, Part [b] "Held or recognized not to be improper, or to be nonprejudicial," and cases cited thereunder.

The record makes it entirely clear also that neither bias, prejudice, strong feelings or lack of impartiality played any part in Judge Prendergast's consideration or determination of the motion to enforce the settlement agreement. We see no reason why, as a matter of law, he was disqualified to act simply because he had a knowledge of what had previously happened in the case, a knowledge obtained in the course of his official judicial duties. We have recognized that merely because a finder of fact has knowledge of previous happenings in a case it is not to be presumed he has prejudged the case. *Board of Medical Examiners v. Steward*, 203 Md. 574, 583. There is nothing in the record to suggest that Judge Prendergast did not decide the motion to enforce the settlement on an entirely objective basis.

Another reason why Chertkof cannot prevail in his claim that he is not bound on his contract to settle is that he knowingly and voluntarily with full knowledge of all pertinent facts submitted to Judge Prendergast the determination of his claim that the release was not in accord with the agreement reached. If Chertkof had a wish or a right to have the issue he raised tried by another finder of fact, he waived that wish or that right. Even a fundamental constitutional right can be knowingly and voluntarily waived. The effect of such a waiver is reflected in Maryland Rule 885, provid-

ing that a matter not raised or decided below will not ordinarily be considered on appeal. See in this connection and context *Wright v. Mathias* (D.C. Mun.App.), 128 A.2d 658.

Judge Prendergast's finding that the exoneration provided by the general release to Chertkof and the judgment in his favor for costs was fully in accord with what was agreed to orally on June 7 and reduced to writing on June 8 finds support in Chertkof's own statements to Judge Prendergast. He told the court before lunch on June 7 that "the prime consideration would have to be exoneration from the counter-claim" and stated that "the court tried to assure me *that this would be in the form of a release and a judgment in favor of the defendant*," (emphasis added). Later in the day, after the $85,000 figure had been agreed to, Chertkof says he then told Judge Prendergast that he would accept the $85,000 "in respect of the court" and "you [Judge Prendergast] assured me, sir, that I would have this *in the form of a judgment, and Court costs and it would be stipulated in the release*," (emphasis added). To this must be added the statements of counsel as officers of the court to Judge Prendergast, including those of Chertkof's lawyer who, with commendable candor, as his duty required, conceded that what Chertkof says Judge Prendergast told him the form the exoneration would take is what was agreed upon. Further support for the finding that Chertkof agreed to what the dictated stipulation provides is the fact that an apology for allegations in a pleading would be so unusual that had it been agreed to, it surely would have been clearly and unmistakably spelled out.

There are other buttressing inferences that the dictation of June 8 fully and accurately expressed the agreement of June 7. It may fairly and reasonably be inferred that the oral agreement and the written expression thereof fully coincided because it is known that Chertkof went to lunch on June 7 with his lawyer after a two-hour discussion of his prime wish for exoneration, later that day heard the

settlement terms revealed to the lawyers after full agreement had been reached, and chose not to go to the meeting the next morning but to permit his lawyer to express the terms in a writing, which he certainly would not have done if he had not thought his lawyer knew precisely what had been agreed to and which his lawyer would not have done had he not been confident he knew precisely what was to be reduced to writing.

Chertkof's claim that there was no meeting of the minds because he thought exoneration meant one thing and everyone else thought it meant another is refuted not only by his own accounts of Judge Prendergast defining it to him but by the law of contracts. In *Ray v. Eurice*, 201 Md. 115, 127, quoted with approval *Williston*, *Contracts* (Rev. Ed.), § 21, and then Judge Learned Hand as follows:

> "'The only intent of the parties to a contract which is essential, is an intent to say the words and do the acts which constitute their manifestation of assent.' Judge Learned Hand expressed it in this wise: 'A contract has, strictly speaking, nothing to do with the personal or individual intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort.' *Hotchkiss v. National City Bank*, 200 Fed. 287, 293."

We also quoted with approval § 94, page 294 of *Williston*:

> "'It follows that the test of a true interpretation of an offer or acceptance is not what the party making it thought it meant or intended it to mean, but what a reasonable person in the position of the parties would have thought it meant.'"

See, too, Restatement *Contracts* §§ 19, 20, Comment a, 21 and 71, Comment a.

Chertkof's reliance on unilateral mistake is further misplaced. See Restatement *Contracts* §§ 71 and 501. Comment b of § 501 says in pertinent part:

> "Misunderstanding exists where the words or other acts of the parties indicate assent, but one or both of the parties in fact intend something different from what the words or acts express. If the misunderstanding is due to the fault of one party and the other party understands the transaction according to the natural meaning of the words or other acts, both parties are bound by that meaning."

If Chertkof thought exoneration included an apology or if he was doubtful on the point, he should have had his lawyer tell him what a release and a judgment for costs embraced. If he did not, he has only himself to blame. *Huber v. Mullan* (D.Md.), 246 F.Supp. 8, 17, *aff'd* 350 F.2d 872 (4th Cir.). Since the words of the agreement as to exoneration had their ordinary and normal meaning to everyone except Chertkof—assuming his position on this point was not an afterthought as it obviously was as to the proposed changes concerning prepayment and the date of the first payment—the test of objective meaning is fully applicable and controlling. *Ray v. Eurice*, *supra*; *Glass v. Doctors Hospital, Inc.*, 213 Md. 44, 57-58.

The order appealed from will be affirmed.

ORDER AFFIRMED, WITH COSTS

LIBRARY
SUPREME COURT, U. S.

APR 3 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1108

JACK O. CHERTKOF,

Petitioner,

v.

HARRY C. WEISKITTEL CO., INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION

JOSEPH SHERBOW,
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ROBERT W. KERNAN,
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Baltimore, Maryland 21202,
Attorneys for Respondent.

Of Counsel:
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Baltimore, Maryland.

The Daily Record Co., Baltimore, Md. 21203

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IN THE

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OCTOBER TERM, 1963

No. 1108

JACK O. CHERTKOF,

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HARRY C. WEISKITTEL CO., INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION

JURISDICTION

The Petitioner invokes jurisdiction under 28 U.S.C., Section 1257 (3). The record, however, does not support such an invocation. Petitioner states that he specially set up or claimed one of his rights under the Constitution of the United States, but, there is nothing in the record to show that either Petitioner or his then lawyer, objected to the trial judge proceeding to hear the motion to enforce the settlement agreement. No motion to disqualify the trial judge was ever filed. These failures on the part of the Petitioner constitute, as the Court of Appeals of Maryland

found, an adequate state ground for its denial of relief. Moreover, although Petitioner attempted to raise the federal question for the first time on appeal, nowhere in the decision of the Court of Appeals of Maryland, does the Court specifically state that it is deciding the federal question.

QUESTION PRESENTED

Has the Petitioner been denied due process of law by a state judge's hearing and ruling on a motion to enforce an agreement to settle a civil suit, where such agreement was arrived at after the judge, at the request of all counsel, conferred alone with the parties and thereafter counsel for all parties dictated the terms of the settlement agreement into the record and where neither Petitioner nor his then counsel objected, nor moved to disqualify the judge from hearing the motion?

MARYLAND RULE INVOLVED

Vol. 9B Annotated Code of Maryland (1957) 1963 Replacement Volume:

> "Rule 885. Scope of Review — Limited to Questions Decided by Lower Court.
>
> This Court will not ordinarily decide any point or question which does not plainly appear by the record to have been tried and decided by the lower court; but where a point or question of law was presented to the lower court and a decision of such point or question of law by this Court is necessary or desirable for the guidance of the lower court or to avoid the expense and delay of another appeal to this Court, such point or question of law may be decided by this Court even though not decided by the lower court. Where jurisdiction cannot be conferred on the Court by waiver or consent of the parties, a question as to the jurisdiction

of the lower court may be raised and decided in this Court whether or not raised and decided in the lower court."

COUNTER-STATEMENT

During a jury trial of a civil action in a state court, it was suggested by the lawyers for both sides that the trial judge attempt to promote settlement and that he confer alone with the parties (E. 21, 30).* The lawyers were fully advised by the judge of what was transpiring from time to time during the negotiations and the parties were sent to confer at various times with their lawyers as the negotiations progressed (E. 21-22, 24, 26, 28-29, 30, 42). A settlement agreement was ultimately orally concluded (E. 42). Since it was late in the day, it was further agreed that there would be a meeting in the morning, when the terms of the settlement agreement would be dictated to the court reporter (E. 21, 42).

In the morning the lawyers for the parties appeared before the trial judge in his chambers (E. 22). The Petitioner's lawyer advised the Court that the Petitioner did not plan to attend but that he would like a copy of the transcript of the proceedings in open court and a copy of the settlement stipulation (E. 42). The Respondent's lawyer dictated to the reporter the terms of the agreement reached the day before (E. 22-24). The Petitioner's lawyer did not object to the terms of the agreement as dictated, nor did he indicate or suggest that what was dictated was not a complete and accurate expression of the agreement (E. 22-24). When the dictation ended, the trial judge convened in open court and advised the jury that an amicable disposition of the claim and counterclaim had been entered

* "E" refers to the Record Extract filed in the Court of Appeals of Maryland, part of the record (R. 2-66) certified by that court to this Court.

into by the parties and their counsel, ordered the withdrawal of a juror and declared a mistrial (E. 24).

In due time, the papers carrying out the settlement were forwarded to Petitioner's lawyer (E. 42-43). Petitioner then claimed, among other things, that he wanted, as the trial court later characterized it, an "apology" in the release in the following explicit form: "It is further acknowledged that the allegations contained in the counter-suit were without foundation" (E. 31, 43). The Respondent would not agree to this proposed change because it had not been agreed to, might expose it to new law suits and was a reflection on the parties and counsel who had filed the counterclaim against Petitioner (E. 31).

After tender on its part and several unsuccessful demands on the Petitioner for performance of his agreement, Respondent filed a motion for enforcement of the settlement agreement (E. 24-25, 43). A hearing on the motion was held before the trial judge at which Petitioner and his lawyer appeared (E. 24-25). The Petitioner's lawyer told the trial court that no answer to the motion would be filed but that he wanted the Petitioner to explain for himself why he felt he should not sign the settlement papers (E. 24-25). The trial court then heard from the Petitioner who amplified at some length concerning the lack of an "apology" in the release from the Respondent (E. 28-30). Counsel were heard and then the trial court asked Petitioner's counsel whether there was anything in the release to the Petitioner contrary to the understanding arrived at in the settlement agreement as transcribed, to which Petitioner's counsel replied that it was not contrary to his understanding but rather to his client's understanding (E. 33). At no time during this hearing did Petitioner or his lawyer let the trial judge know that they thought it unfair for him to decide the motion or move his disqualification

(E. 24-41). The trial court subsequently made formal findings of fact and conclusions of law and entered an order enforcing the settlement agreement (E. 48-51).

ARGUMENT

I.

The Federal Question Was Not Properly Presented.

The question of whether the trial judge should have referred the motion to enforce the settlement agreement to another judge was never raised in the trial court, nor was it initiated in any manner. In fact, the statements of Petitioner and his counsel may be examined with the utmost of care and nothing will be found which would infer or imply that Petitioner felt this procedure unfair.

Under Maryland practice a constitutional objection must be raised before the trial court. *Walters v. State*, 242 Md. 235, 218 A. 2d 678 (1965); *Kirkorian v. State*, 233 Md. 324, 196 A. 2d 866 (1963), cert. denied, 377 U.S. 945, and this court has long followed the rule that it is without power to decide whether constitutional rights have been violated where federal questions have not been seasonably raised in accordance with the requirements of state law. *Hulbert v. Chicago*, 202 U.S. 275, 26 S. Ct. 617 (1906); *Edelman v. People of State of California*, 344 U.S. 357, 73 S. Ct. 293 (1953). The failure of the Petitioner in this case to raise the issue in the trial court is within the ambit of those decisions and accordingly jurisdiction should be declined.

On appeal to the Court of Appeals of Maryland, new counsel for Petitioner, for the first time claimed that the trial judge, *sua sponte*, should have sent the matter to some other trier of facts for determination and urged that the trial judge's failure to do so deprived the Petitioner of due process under both the federal and Maryland Constitutions. The Court of Appeals of Maryland did not decide either

question. It merely said that it saw no reason why, as a matter of law, the trial judge was disqualified to act simply because he had a knowledge of what had previously happened in the case, a knowledge acquired in the course of his official judicial duties. It did not decide whether the trial judge's failure to refer the case to another judge was or was not violative of due process under either Constitution. Where the highest state court is silent on the federal question this court has declined jurisdiction on the assumption, unless it can be affirmatively shown otherwise, that the silence is due to the procedural deficiency. *Bailey v. Anderson,* 326 U.S. 203, 66 S. Ct. 66 (1945); *Mutual Life Ins. Co. v. McGrew,* 188 U.S. 291, 23 S. Ct. 375 (1903). Here, the record affirmatively shows the contrary; i.e., that the Maryland Court of Appeals relied on the procedural deficiency. That Court said (App. B. of Petition, p. 9):

> "If [Petitioner] had a wish or a right to have the issue he raised [whether he was bound by the settlement] tried by another finder of fact, he waived that wish or that right. * * * The effect of such a waiver is reflected in Maryland Rule 885, providing that a matter not raised or decided below will not ordinarily be considered on appeal." (Citation omitted.)

Finally, jurisdiction should not be taken for the reason that such noncompliance with local rules has been held by this court to be an adequate state ground for decision and therefore precludes this court's review of the judgment. *Edelman v. People of State of California, supra; Black v. Cutter Laboratories,* 351 U.S. 292, 76 S. Ct. 824 (1956); *Stembridge v. State of Georgia,* 343 U.S. 541, 72 S. Ct. 834 (1952).

There being no jurisdiction in this court, the petition for the writ should be dismissed.

II.

The Writ Should Not Be Granted.

A. *There Is No Conflict of Decision.*

Petitioner asserts a conflict in decisions as one of the bases for granting the Writ. He relies on *In Re Murchison,* 349 U.S. 133, 75 S. Ct. 623 (1955) to establish this conflict. This Court will recall that *Murchison* was a criminal contempt case involving Michigan's one-man (judge) grand jury system which combined in a single official, the historically separate powers of grand jury, committing magistrate, prosecutor, trial judge and petit jury. In that case this court held that the due process requirement of an impartial tribunal was not met where the same judge presiding at the contempt hearing had also served as the "one-man (judge) grand jury" out of which the contempt charges arose.

Petitioner claims this court declared in *Murchison* that personal knowledge of facts in issue will, without more, disqualify a judge. No such declaration appears in that decision. On the contrary, in that case, the pivotal conclusion is that a judge who is a part of the accusatory process cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those he has accused. The Court said (p. 137):

> "Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer."

It is apparent from the above conclusion that it was not the fact that the judge had personal knowledge that caused the constitutional infirmity in *Murchison;* it was, on the contrary, the aggregate authority he had which in a criminal setting bespeaks probable abuse of constitutional dimension.

Further, one-man (judge) grand jury procedures and criminal prosecution arising therefrom should not be compared with a settlement conference administered by a judge during a civil trial at the request of counsel and a subsequent motion to enforce that agreement. In the settlement situation the judge has no direct, personal, substantial or pecuniary interest in reaching a conclusion against the petitioner, therefore, due process is not in jeopardy. Cf. *Tumey v. State of Ohio*, 273 U.S. 510, 47 S. Ct. 437 (1927). The rule is well established that within proper bounds, a trial judge should encourage the settlement of litigated cases and he does not exceed proper boundaries in encouraging settlement unless a party can show his bias, hostility, duress or that he has prejudged the case. *Annotation: "Judge's Comments - Urging Settlement"*, 6 A.L.R. 3d 1457. None was shown here.

Murchison is also not applicable for the plain and simple reason that objection to the constitutional defect was timely made in that case while here it was not.

In sum, in *Murchison*, the trial judge was an accuser, a committing magistrate, a prosecutor and the trier of fact. In the present case, the trial judge merely administered a settlement at the request of all counsel and heard a motion to which no one objected. It is apparent that the procedures employed in the two cases are not comparable. In *Murchison*, one is forced to conclude that the trial judge could not be wholly disinterested in the outcome of the trial, that is, that the procedure employed by the State, was so pregnant with probable prejudice, it was inherently lacking in due process. *Estes v. State of Texas*, 381 U.S. 532, 542, 85 S. Ct. 1628, 1633 (1965). In the civil trial settlement situation one is not required to conclude that because the judge administered the settlement agreement he could not be wholly disinterested in the outcome of the motion.

B. *There Is No Important Question of Federal Law.*

The alleged federal question raised by Petitioner is not important. First, it is based on an incorrect premise; i.e., that under our law the trier of facts is ordinarily disqualified by personal knowledge. This is not the law and the prior knowledge only has relevance as to any bias or prejudice on the part of the trier of fact. *Stevenson v. Stevenson,* 222 Ga. 47, 148 S.E. 2d 388 (1966); *Sinahopoulas v. Villa,* 92 N.J. 514, 224 A. 2d 140 (1966); *State v. Lockridge,* 6 Okla. Cr. 216, 118 P. 152 (1911). See also: *United States v. Re,* 372 F. 2d 641 (C.A. 2d 1967), cert. denied, 388 U.S. 912. Second, the decision obviously turns on its own facts and will therefore affect few persons other than the litigants themselves. Any decision would have to be limited to a court administered settlement which breaks down because of a dispute as to one of the terms of the settlement and a subsequent motion upon which a hearing is held before the same trial judge and the complaining party fails to let the trial judge know that he thinks that it is unfair for him to decide the motion.

C. *It Is Uncertain That the Alleged Federal Question Can Be Reached Even if the Court Were To Take This Case.*

Even if this Court were to accept this case, it would have to go behind the Maryland Court of Appeals finding as to waiver and depending on the outcome of that review, only then could it reach the alleged federal question. While the Respondent is aware that this court has the authority to go behind the factual finding of a state court when said finding involves a constitutional right, it is clear that even if the court were to do this it would be forced to conclude that the Court of Appeals of Maryland is correct on the waiver point. The record clearly reveals "* * * that [Petitioner] knowingly and voluntarily with full knowl-

edge of all pertinent facts submitted to [the trial judge] the determination of his claim * * *". (App. B of Petition, p. 8). *Yakus v. United States*, 321 U.S. 414, 64 S. Ct. 660 (1944); *Pacheco v. People of Puerto Rico*, 300 F. 2d 759 (C.A. 1st 1962); *McCall v. Warden, Maryland House of Correction*, 3 Md. App. 188, 238 A. 2d 574 (1968); *State v. Kohlfuss*, 152 Conn. 625, 211 A. 2d 143 (1965).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be dismissed or denied.

Respectfully submitted,

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